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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EMMANUEL M., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. L.J. et al., Defendants and Appellants.	D054437 (Super. Ct. No. J515893B)

APPEALS from orders of the Superior Court of San Diego County, Carol Isackson, Judge. Affirmed.

L.J. and J.M. appeal orders terminating parental rights to their son, Emmanuel M., under Welfare and Institutions Code section 366.26.[1] L.J. also appeals an order denying his petition for modification under section 388, and J.M. appeals an order summarily denying her section 388 petition. We affirm the orders.

1 Further statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

The subject of this appeal is Emmanuel M., born in January 2006 to Sudanese emigrants L.J.[2] and J.M. Emmanuel has a younger sister, C., born in February 2007, and an older half-sister, P., born to J.M. in Sudan in September 1997. All three children are involved in dependency proceedings.

The San Diego County Health and Human Services Agency (Agency) detained Emmanuel in protective custody when he was eight days old. The Agency alleged Emmanuel was at substantial risk of physical abuse because J.M. had hit P. with an electrical cord, injuring her, and she did not comply with services in P.'s ongoing dependency case. J.M. had a five-year history of substantiated and inconclusive child welfare referrals, involving alcohol abuse, general neglect, emotional abuse and domestic violence with different partners, including L.J.

At the jurisdiction hearing in February 2006, J.M. submitted to the petition. (§ 300, subd. (a).) L.J. had actual notice of the proceedings but did not appear until April 16, 2008.[3] J.M.'s parenting skills improved with services.

C. was born in February 2007. She was adjudicated a dependent and remained in the home.

In April 2007 the court returned Emmanuel to J.M.'s care with intensive in-home family preservation services. P. returned home in June.

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2 In June 2008 testing confirmed L.J.'s paternity. On July 15 the court changed L.J.'s status from alleged father to biological father.

3 We discuss notice provided to L.J. in Discussion, Part I.B., footnote 7, *post*.

In August 2007 the Agency detained Emmanuel and his sisters in protective custody. The Agency alleged J.M. hit Emmanuel, leaving marks on his arm and leg, and left him and his siblings without supervision. P. reported J.M. routinely hit her with a plastic hanger or bed slat on her sides, ribcage, thighs, legs and arm, and also hit Emmanuel with a hanger. P. had linear, parallel marks on her left arm. Emmanuel had linear discolorations on his thigh, face and bicep. P. saw J.M. grab Emmanuel by the throat and put him on the couch. Emmanuel ran to P. whenever J.M. approached him.

On December 21, 2007, the court sustained the petition, removed Emmanuel from parental custody and set a section 366.26 hearing. The court also set a section 366.26 hearing for P.[4] and ordered a plan of family reunification services for C.

L.J. made his first appearance in Emmanuel's dependency case on April 16, 2008. On August 22 L.J. filed a section 388 petition alleging the Agency did not make reasonable efforts to locate and notify him, and he had not been given adequate information about the nature of the proceedings. L.J. requested presumed father status and custody of Emmanuel or family reunification services. The court set an evidentiary hearing only on L.J.'s request for reunification services.

The evidentiary hearing began on September 22, 2008, and concluded on January 9, 2009. The court admitted Agency reports in evidence. P., the social worker, and psychologist Shaul Saddic, Ph.D. testified.[5]

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4 The record indicates that at some point prior to November 10, 2008, the court selected an alternate permanent plan (APPLA) for 11-year-old P.

The parties stipulated that if L.J. were to testify, he would state he became aware that Emmanuel was subject to dependency proceedings on or about January 25, 2006, and willingly failed to attend the detention hearing. He did not make an appearance until April 2008. L.J. did not appreciate that he could lose his parental rights to Emmanuel and that Emmanuel could be placed for adoption.

On December 16, 2008, J.M. filed a section 388 petition seeking Emmanuel's return to her care under a plan of family maintenance services. She stated she consistently visited Emmanuel and made significant progress in continued services, and that the modification was in Emmanuel's best interests because he was bonded to her and to his sisters and he would benefit from exposure to his Sudanese heritage in her care.

On January 9, 2009, the court denied L.J.'s section 388 petition and summarily denied J.M.'s section 388 petition. The parties proceeded to the contested section 366.26 hearing. The court received the evidence presented at the section 388 hearing and admitted the Agency's section 366.26 reports and addendums and the parents' exhibits. The social worker, J.M., L.J., and Emmanuel's and C.'s foster parent (caregiver) testified.

P. stated she loved Emmanuel and he loved her. She helped her mother take care of him for two months. Now she saw Emmanuel once a week and felt welcome in the caregiver's home.

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5 In this section, we briefly describe the evidence presented at the section 388 and section 366.26 hearings in the light most favorable to the court's findings and orders. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461.) To avoid repetition, we discuss additional relevant evidence in Discussion, *post*.

The caregiver testified that until Emmanuel was placed in her home in September 2008, she did not see a strong bond between him and P. Emmanuel's bond with P. became stronger after the caregiver facilitated P.'s visitation in her home three or four times each month. Each visit typically lasted eight to 10 hours. Earlier that week, P. stayed with them from Sunday morning until Monday night.

The social worker stated J.M. maintained consistent weekly visits with Emmanuel throughout the reunification period. J.M. made her best efforts to parent Emmanuel but she did not successfully address her lack of safe and appropriate parenting skills, and her mental health and domestic violence issues. Emmanuel had strong sibling relationships with P. and C. The social worker considered the sibling relationships when she recommended adoption and concluded Emmanuel required a safe, stable permanent home.

J.M. loved Emmanuel and felt he loved her. She wanted him to come home.

After the close of evidence on January 14, 2009, the court stated the parents did not show termination of the parent-child relationships would greatly harm Emmanuel. Because of the siblings' ages and limited time together in the same household, the court could not find that Emmanuel had a significant sibling relationship with either P. or C. The court selected adoption as Emmanuel's permanent plan and terminated parental rights.

DISCUSSION

I

Section 388

A. The Court Did Not Abuse Its Discretion When It Summarily Denied J.M.'s Section 388 Petition

J.M. contends the court abused its discretion when it summarily denied her section 388 petition. She argues her section 388 petition established a prima facie case of changed circumstances because she alleged facts, which if proved, would show she met her treatment goals and made significant changes in her ability to parent, and consistently visited Emmanuel. J.M. argues she established a prima facie case that modification was in Emmanuel's best interests. She showed Emmanuel had an established relationship with her and his siblings, and he would benefit from maintaining those relationships. L.J. joins with J.M.'s arguments.

Under section 388, a party may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, there is a change of circumstances or new evidence and the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) If the petition does not state a change of circumstance or new evidence that may require a change of

order, or that the requested modification would promote the best interest of the child, the court may deny the application ex parte. (Cal. Rules of Court, rule 5.570(d).)[6]

"The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

The court must liberally construe the petition in favor of its sufficiency. (*In re Marilyn H., supra,* 5 Cal.4th at p. 309; rule 5.570(a).) When determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189; see *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

We review a summary denial of a hearing on a modification petition for abuse of discretion. (*In re Zachary G., supra,* 77 Cal.App.4th at p. 808.) Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

Here, the court rationally determined the facts alleged in J.M.'s section 388 petition were not sufficient to sustain a favorable decision on its merits. (*In re Zachary G., supra,* 77 Cal.App.4th at p. 806.) Emmanuel was removed from J.M.'s custody

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6 Further rule references are to the California Rules of Court.

shortly after birth because of her history of child physical abuse, domestic violence and other risk factors. J.M. received extensive services in P.'s case (starting in March 2005) and throughout the reunification period in Emmanuel's case. When Emmanuel returned to her care, the Agency implemented intensive family preservation services, including in-home assistance.

Despite the provision of, and J.M.'s compliance with, family reunification and preservation services, when two-year-old Emmanuel returned home, J.M. struck him with a hanger on more than one occasion. J.M. misled the social worker about her relationship with L.J. and his whereabouts, as shown by C.'s birth. Four months before she filed her section 388 petition, L.J. and J.M. engaged in an incident of domestic violence, resulting in L.J.'s arrest. Within weeks, J.M. and L.J. violated the restraining order.

While J.M. may have made progress in individual therapy and established a friendly relationship with Emmanuel through regular visitation, she did not offer evidence to show she could consistently provide a safe, stable home to Emmanuel, free from domestic violence and physical abuse. Dr. Shaddic stated J.M. and L.J. had made no progress in conjoint therapy. The record shows J.M. continued to struggle to apply what she had learned from many years of services. The court reasonably determined J.M.'s section 388 petition did not state a prima facie case to show changed circumstances or that Emmanuel's return to her custody would promote his best interests. (Rule 5.570(d).)

2. The Court Did Not Err When It Denied L.J.'s Section 388 Petition

L.J. contends the court erred when it denied his section 388 petition. L.J. argues notice was constitutionally defective because he did not receive culturally competent notice and did not understand Emmanuel's dependency proceedings. He came forward when he finally understood the proceedings could result in the loss of his parental rights. To the extent it inures to her benefit, J.M. joins L.J.'s argument.

A section 388 petition is a proper vehicle to raise a due process challenge based on lack of notice. (*In re Justice P., supra*, 123 Cal.App.4th at p. 189, citing *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481, 487-488.) In order to prevail, even on constitutional issues, the petitioner must show by a preponderance of the evidence changed circumstances or new evidence and that the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O., supra*, 8 Cal.4th at pp. 415-416; *In re Justice P., supra*, 123 Cal.App.4th at p. 189.)

Parents, including alleged fathers, are entitled to due process notice of dependency proceedings affecting the care and custody of their children. (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418; *Stanley v. Illinois* (1972) 405 U.S. 645, 651.) L.J. implicitly acknowledges the Agency's efforts to notice him satisfied statutory requirements.[7]

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7 The social worker spoke with L.J. on January 25, 2006. He provided the social worker with a telephone number for messages but did not give her a mailing address. On January 27 the social worker left a voice mail message for L.J. advising him of the initial hearing. L.J. did not appear.

The Agency attempted to notice L.J. of the jurisdictional hearing. The court found that the Agency attempted notice on L.J. His address was noted as "unknown." The Agency then initiated a parent search for L.J. His whereabouts were unknown at the time of the six-month review hearing. The Agency conducted another parent search.

Therefore we review whether the Agency's efforts to provide notice to L.J. satisfied constitutional requirements. Constitutional issues are reviewed de novo. (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 433.)

L.J. properly cites *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 (*Mullane*) and its progeny for the fundamental principle that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Ibid.*) He assumes, without citation to specific authority, that culturally competent notice is constitutionally required. The Agency states it could not locate any case directly on point and we, too, did not locate any such authority. The Agency instead cites a number of state and federal cases addressing notice to non-English speaking litigants, including *Guerrero v. Carleson* (1973) 9 Cal.3d 808 (*Guerrero*) for the analogous proposition that due process requirements do not compel special notice provisions to culturally diverse litigants.

In January 2007 the Agency learned L.J. was receiving mail at an address in San Diego. Notice of the 12-month review hearing was sent to L.J. at that address.

In August 2007 the results of another search for L.J. were pending. In September the Agency notified L.J. by first class mail of the section 387 hearing. The social worker spoke to L.J. by telephone to inform him of the hearing and encourage him to appear. L.J. did not appear.

On November 26, 2007, the court ordered the Agency to conduct a reasonable search to locate and notify L.J. of the proceedings. In January 2008, the Agency located him in the East Mesa Detention Center.

In March 2008, L.J. completed a paternity declaration in C.'s dependency proceedings. He stated he lived with C. for five months after her birth in February 2007. A friend reported that L.J. lived with J.M. during her pregnancy with C.

L.J. first appeared in Emmanuel's case on April 16, 2008.

In *Guerrero*, the appellants were Spanish-only literate persons who lost public welfare benefits when they did not respond to English-language notices advising of proposed reductions or termination of their benefits. In arguing the English-only notices constituted a denial of due process, appellants relied on *Covey v. Town of Somers* (1956) 351 U.S. 141, 146 (*Covey*). (*Guerrero, supra*, 9 Cal.3d at pp. 811-812.) The U.S. Supreme Court held in *Covey* that notice that may be sufficient for an ordinary litigant may not be adequate for a person known to be without mental capacity to understand the meaning of any notice. (*Covey*, *supra*, at p. 146.)

The *Guerrero* court declined to extend *Covey* to welfare recipients who were not literate in English. The appellants were not illiterate and they were able to understand the meaning of the notice, once translated. The court stated although the use of Spanish in these and similar notices would be desirable and should be encouraged, constitutional due process requirements did not compel prior translation of notice. (*Guerrero*, *supra*, 9 Cal.3d 808 at pp. 811-812, 814.) It was reasonable to assume that in a predominately English-speaking society, a non-English speaker would seek assistance when he or she received a government communication. (*Id.* at p. 811, 813-814; accord *Soberal-Perez v. Heckler* (2d Cir. 1983) 717 F.2d 36, 43 [a rule placing the burden of diligence and further inquiry on a non-English speaking person served in this country with a notice in English does not violate any principle of due process].)

To the extent *Covey* or *Guerrero* may apply here, there is no evidence to show L.J. was incompetent or that his primary language or culture rendered him unable to understand the many notices provided by the Agency. L.J. spoke English and declined

the services of a translator. The Agency informed L.J. personally, on more than one occasion, of the proceedings and his right to appear. Throughout Emmanuel's dependency proceedings, the Agency encouraged L.J. to participate in the proceedings when it was in contact with him, attempted to locate him when his whereabouts were unknown and provided notice to him to the best extent possible.

L.J. stipulated that he had actual notice of the initial proceedings and willfully failed to appear at the detention hearing. Had he appeared, he would have been entitled to the assistance of counsel. (§§ 316.2, 317.) When Emmanuel was first detained, the social worker contacted him by telephone. Had L.J. provided his mailing address to her, he would have been served with a copy of the section 300 petition, which states, "Your parental rights may be permanently terminated. To protect your rights, you must appear in Court and answer this petition."

Further, we are not impressed with L.J.'s argument he did not understand the proceedings until J.M. explained them to him. The record permits the reasonable inference L.J. lived with J.M. during her pregnancy with C., and for five months after C.'s birth. This time period encompasses Emmanuel's return home. If L.J. did not understand the proceedings or what had happened to his children, all he had to do was ask. (Cf. *Guerrero, supra*, 9 Cal.3d at p. 813-814; *Soberal-Perez v. Heckler, supra,* 717 F.2d at p. 43.)

The record clearly shows the Agency and the court provided notice reasonably calculated, under all the circumstances, to inform L.J. of the pendency of the action and afford him an opportunity to appear, obtain counsel, change his paternity status, present

his objections and participate in the proceedings. (*Mullane, supra,* 339 U.S. at p. 314; see *Guerrero, supra,* 9 Cal.3d at p. 814; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1408.) There is no error.[8]

II

Termination of Parental Rights

J.M. contends the court erred when it did not apply the beneficial parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)) or the sibling relationship exception (§ 366.26, subd. (c)(1)(B)(v)) and terminated parental rights. L.J. joins with J.M.'s arguments.

At a permanency plan hearing under section 366.26, the court may order one of three alternatives: adoption, guardianship, or long-term foster care. (*In re Taya C.* (1991) 2 Cal.App.4th 1, 7.) If the dependent child is adoptable, there is a strong preference for adoption over alternative permanency plans. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888; *In re Zachary G., supra,* 77 Cal.App.4th at pp. 808-809.)

After the court determines a child is likely to be adopted, the burden shifts to the parent to show termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54

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8 The court properly rejected L.J.'s assertion a period of reunification services would promote Emmanuel's best interests. We reject L.J.'s disingenuous argument he would have visited his son and participated in reunification services had he known the proceedings might lead to termination of his parental rights.

Cal.App.4th 1330, 1343-1345.) The relevant exceptions here are the beneficial parent-child relationship exception and the sibling relationship exception, discussed in greater detail below.

We determine whether there is substantial evidence to support the court's ruling by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) If there is substantial evidence supporting the court's ruling, the reviewing court must affirm the court's rejection of the exceptions to termination of parental rights under section 366.26, subdivision (c). (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*); *In re S.B.* (2008) 164 Cal.App.4th 289, 298.)

A. The Beneficial Parent-Child Relationship Exception Did Not Apply to Preclude Termination of Parental Rights

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

"Benefit from continuing the relationship" means "the [parent-child] relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H., supra,* 27 Cal.App.4th at p. 575.) It does not require proof the child has a "primary attachment" to a parent or the parent maintained day-to-day contact with the child. (*In re S.B., supra,* 164 Cal.App.4th at p. 200; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534-1538; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Where the parent has continued to regularly visit and contact the child, and the child has maintained or developed a significant, positive, emotional attachment to the parent, "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.)

At the time of the section 366.26 hearing, Emmanuel was almost three years old. His four months in J.M.'s care were marred by physical abuse and neglect. Emmanuel was afraid of J.M. and ran to P. whenever J.M. approached him. Although J.M. was later able to assuage Emmanuel's fears through regular, supervised visits, she did not consistently meet his needs at those visits. Emmanuel did not show a preference for J.M. and often looked to the social worker or P. to meet his needs. During visits, Emmanuel often wanted P. to hold him. The social worker stated the nature of the parent-child relationship was that of friendly visitors or distant relatives. Substantial evidence supports the court's determination the beneficial parent-child relationship exception did not apply. (§ 366.26, subd. (c)(1)(B)(i).)

B. The Sibling Relationship Exception Did Not Apply to Preclude Termination of Parental Rights

The sibling relationship exception applies when the parent shows, by a preponderance of the evidence, that termination of parental rights would be detrimental to

the child because it would substantially interfere with a child's sibling relationship, taking into consideration the nature and extent of the relationship. (§ 366.26, subd. (c)(1)(B)(v).)

"To determine the nature and extent of the sibling relationship, the Legislature directs the juvenile court to consider the factors set forth in section 366.26, subdivision [(c)(1)(B)(v)]." (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007, citing *In re Celine R.* (2003) 31 Cal.4th 45, 54 and *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-952.) These factors include, but are not limited to, "whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

The record shows Emmanuel had friendly, playful, age-appropriate relationships with P. and C. However the siblings were not raised in the same home. Emmanuel lived with P., who was eight years his senior, for two months. He lived with C., then an infant, for four months in J.M.'s home and from September 2008, when he was placed in her caregiver's home. He did not have a close relationship with P. until his new caregiver (and potential adoptive parent) began to facilitate extended sibling visitation. Emmanuel was a happy child who enjoyed playing with all the older children in the caregiver's home. The social worker considered Emmanuel's interests and concluded his long-term emotional interests would be better served through adoption, even if termination of

parental rights and adoption resulted in substantial interference with his sibling relationships.

This court has previously stated that the application of sibling relationship exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount. (*In re Valerie A., supra*, 152 Cal.App.4th at p. 1014, citing *In re L.Y.L., supra*, 101 Cal.App.4th at p. 950.) In view of Emmanuel's age and needs, we conclude there is substantial evidence to support the court's finding the sibling relationship exception did not apply. (§ 366.26, subd. (c)(1)(B)(v).)

DISPOSITION

The orders are affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.